IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
March 25, 2008 Session

ERIC MATTHEW KESTERSON v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Hamblen County
No. 06CR415 John Dugger, Jr., Judge

No. E2007-02001-CCA-R3-PC - Filed May 21, 2008

The petitioner, Eric Matthew Kesterson, pled guilty to rape of a child in exchange for a sentence of fifteen years to be served at 100%. The petitioner now appeals the post-conviction court's denial of his request for post-conviction relief and contends that: (1) he received the ineffective assistance of counsel and (2) his guilty plea was unknowing and involuntary. Upon review of the record and the parties' briefs, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Timothy W. Flohr, Greenville, Tennessee, for the appellant, Eric Matthew Kesterson.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; C. Berkeley Bell, Jr., District Attorney General; and Kevin Keaton, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS AND PROCEDURAL HISTORY

On June 13, 2005, the petitioner pled guilty to the rape of a child, a Class A felony, and received a sentence of fifteen years to be served at 100% in the Department of Correction. The petitioner filed a notice of appeal on October 7, 2005. However, the direct appeal was dismissed by this court on January 17, 2006, because the petitioner failed to file a brief. Thereafter, the petitioner filed a timely petition for post-conviction relief, and later an amended petition was filed. The post-conviction court conducted an evidentiary hearing on July 5, 2007.

At the hearing, the petitioner acknowledged that he gave a statement to police where he said that there was "no rape" but indicated that he had touched the victim's private area between her legs. The petitioner noted that he was in jail for approximately nine months before he was able to post

bond. The petitioner complained that he made four to five phone calls to trial counsel for a period of four days before counsel met with him in jail to discuss the case. The petitioner then complained that the first meeting lasted five or six minutes whereupon counsel provided the petitioner with discovery and told him that the state had overwhelming evidence to convict. A month later, counsel met with the petitioner and answered the petitioner's questions regarding the discovery materials. After posting bond, the petitioner scheduled a third meeting with counsel at counsel's office. At this meeting, counsel told the petitioner that there was "no hope" for him, and he would be convicted if he proceeded to trial. Counsel then told him to take a "deal and go."

The petitioner testified that there were no other face to face meetings. The petitioner attempted to reach counsel by phone but was unable to for a few weeks. Eventually, the petitioner, his mother, and counsel spoke by phone whereupon counsel informed the petitioner that the state had made a plea offer of twenty years at 100%. At this time, the petitioner refused the offer and maintained his innocence. According to the petitioner, he had no further contact with counsel until he arrived in court for his trial. At this time, he was informed by counsel that the state had offered fifteen years at 100%. The petitioner said he accepted the state's offer and pled guilty to child rape because he believed counsel's statements that the state had enough evidence to convict him at trial. The petitioner maintained that after he pled guilty, he learned from a law book that in order for the state "to have proof of rape, they've got to have a medical statement stating there was rips, tears, trauma, to the anal area or vagina[l] area or/and semen present inside the person." The petitioner maintained that this type of proof did not exist in his case.

On cross-examination, the petitioner acknowledged that he did not ask counsel about the proof required for a child rape conviction. He also acknowledged that at the guilty plea hearing the trial court informed him of what the state had to prove in order to establish the offense of child rape. He further admitted that counsel informed him that the victim made a statement, accusing him of raping her. The petitioner recalled that counsel told him that he could get up to twenty-five years at 100% should he be convicted after a trial. The petitioner admitted that he and his mother read the plea agreement. He also admitted that he did not ask any questions of counsel when counsel discussed the plea agreement. However, the petitioner maintained that he did not understand the criteria of the plea agreement.

On cross-examination, the petitioner admitted that he informed the trial court that he understood his rights and the details of the plea agreement. He also admitted that he answered affirmatively to the court's questions regarding whether he was knowingly and voluntarily pleading guilty. The petitioner claimed that he was under the influence of the drug, Lortab, at the time of his guilty plea, but he admitted that he did not disclose this information to the court.

The petitioner's mother, Patricia Kesterson, testified that she was present for two or three meetings at counsel's office. She stated that counsel explained the charge against the petitioner and the plea bargain offered by the state prosecutor. She recalled that counsel recommended that the petitioner take the plea. Mrs. Kesterson stated that she felt counsel's response made her "feel like he done had him guilty and tried and then sentenced." Mrs. Kesterson recalled that she talked with counsel a couple of times over the phone. She stated that counsel did not go into the details regarding the evidence against the petitioner.

The petitioner's trial counsel testified that he was appointed to represent the petitioner and met with the petitioner in jail for more than an hour the day he was appointed. At the time, counsel did not have discovery materials. After receipt of discovery materials, he met with the petitioner in jail a second and third time and went over the discovery materials with the petitioner. Counsel also noted that he discussed the DNA evidence with the petitioner during those early meetings in jail. Counsel also discussed the state's initial plea offer of twenty years at 100%. At the time, the petitioner was not interested in the offer and wanted to go to trial. Counsel recalled that at the time of his appointment the petitioner had been given a mental evaluation and was deemed competent. Counsel said that after the petitioner posted bond he became difficult to reach. Counsel tried to contact the petitioner through his mother. The petitioner's mother told counsel that the petitioner was working out of town.

Counsel testified that he did not coerce the petitioner to plead guilty rather than go to trial. Counsel said he simply went over the evidence, including the DNA evidence from the victim's underpants and the victim's statement indicating that the petitioner had anally raped her. Counsel told the petitioner that the "odds were stacked against him and his best interest would be to take the fifteen years" because the "chances of winning at trial were very slim." Counsel stated that he did not file a motion to suppress the petitioner's statement because the petitioner never discussed it and counsel found no grounds to suppress it. Counsel said he did not interview the doctors who examined the victim because the medical report indicated that there were no signs of tearing or sexual trauma which did not prove or disprove sexual activity. He also said he did not interview anyone from the Department of Children's Services, but he would have if the petitioner's case had gone to trial.

Counsel testified that, on the day of the guilty plea hearing, he spent two hours explaining the plea agreement to the petitioner. Counsel recalled that the petitioner was upset and did not want to go to jail, however, he understood the plea agreement and did not appear to be under the influence of drugs.

At the conclusion of the hearing, the post-conviction court took the matter under advisement. In a written order, the post-conviction court held that the petitioner failed to prove his allegations by clear and convincing evidence and dismissed the petition.

ANALYSIS

The petitioner first complains that he received the ineffective assistance of counsel. Specifically, he argues that his counsel was ineffective because: (1) counsel failed to file a motion to suppress the petitioner's statement to police; (2) counsel failed to interview the physicians who examined the victim; (3) counsel failed to interview Department of Children's Services employees who interviewed the victim; (4) counsel failed to review the evidence with the petitioner and meet on a regular basis; and (5) counsel failed to file a Bill of Particulars.

In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, this court is required to affirm the post-conviction court's findings unless

the petitioner proves that the evidence preponderates against those findings. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court's factual findings, such as findings concerning the credibility of witnesses and the weight and value given their testimony, is de novo with a presumption that the findings are correct. *See id.* Our review of the post-conviction court's legal conclusions and application of law to facts is de novo without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001).

In order to establish the ineffective assistance of counsel, the petitioner bears the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense rendering the outcome unreliable or fundamentally unfair. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Arnold v. State*, 143 S.W.3d 784, 787 (Tenn. 2004). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness under prevailing professional standards. *Strickland*, 466 U.S. at 688; *see also Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (establishing that representation should be within the range of competence demanded of attorneys in criminal cases). A fair assessment of counsel's performance, "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Id.* at 694. When a petitioner claims ineffective assistance of counsel in relation to a guilty plea, the petitioner must prove that counsel performed deficiently, and, but for counsel's errors, the petitioner would not have pled guilty but, instead, would have insisted upon going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Should the petitioner fail to establish either element of ineffective assistance of counsel, the petitioner is not entitled to relief. *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996) (citing *Strickland*, 466 U.S. at 697).

In its written order, the post-conviction court found that the petitioner had received the effective assistance of counsel. Addressing the petitioner's complaints in great detail, the court stated:

> In reviewing the issue of whether Petitioner was denied the effective assistance of counsel, the Court finds the facts in the case were very compelling for the state which [made] counsel's representation more difficult. The Petitioner while transporting the six year old victim to school, in his personal vehicle, took the victim to an empty parking lot. The victim alleged that the Petitioner placed his penis in her anus and described the location where the rape occurred. The medical examination of the victim did not show evidence of sexual trauma. The Tennessee Bureau of Investigation Crime Laboratory confirmed the presence of spermatozoa in the victim's panties, and DNA testing confirmed that it matched the Petitioner. On October 30, 2003, the date of the alleged offense, before DNA results were available, Petitioner was the focus of Detective Arnold's investigation. Petitioner was questioned about the allegation and he requested a lawyer (Collective Exhibit 1). All questioning ceased and Petitioner was allowed to go home. On August 2, 2004, approximately nine months later, an arrest warrant for Rape of a Child was served on Petitioner. Detective Vicki Arnold read Petitioner an Admonition and Waiver of

Rights (Exhibit 2). Petitioner signed the waiver of rights on August 2, 2004 at 12:36 p.m. and chose to give a statement where he admitted sexual contact on the outer clothes of the victim.

This Court finds that [counsel] is an experienced criminal defense attorney who regularly represents criminal defendants in State and Federal Courts. [Counsel's] law practice is eighty percent criminal defense and he . . . always represents his clients the best he can.

Petitioner alleges [counsel] should have filed a Motion to Suppress his August 2, 2004 statement and also a Bill of Particulars. [Counsel] contends the District Attorney has an open file discovery policy and the Admonition and Waiver of the Rights was valid. Petitioner alleged that [counsel] did not work on his case by not interviewing witnesses such as doctors and Department of Children Services employees. [Counsel] contends [that] there was [no] need to interview doctors because the medical reports revealed no evidence of sexual trauma.

Petitioner alleges [counsel] did not review discovery with him but gave him a copy of discovery on March 10, 2005 upon counsel's first visit with in jail. However, . . . [counsel] contends he reviewed discovery with Petitioner [at] their third meeting and that Petitioner kept repeating "there is not enough DNA." Petitioner's mother, Patricia Kesterson, testified that [counsel] did go over DNA evidence with Petitioner on their last meeting.

Petitioner alleges that [counsel] did not meet with him on a regular basis. The Court finds that Petitioner chose to work for his bondsman in Greene County which made appointments with counsel more difficult. [Counsel's] claim of attorney fees reveals that he had a total of 19.3 hours of court approved, out-of-court hours in connection with representing Petitioner, including 8.7 hours of meeting or corresponding with Petitioner.

In reviewing the transcript of the Court's allocution of Petitioner's guilty plea on June 13, 2005, the Petitioner answered affirmatively to the questions that: [counsel] explained the waiver of rights and plea of guilty (TR p.5), [counsel] explained elements of what it takes to be found guilty (TR p. 7), . . . [counsel] has explained all these things to you (TR p. 10), [Counsel] went to the D.A.'s office and worked out an agreement for you (TR p. 13), Are you satisfied with the representation of you by your lawyer. . . ? (TR p. 14). Petitioner further responded that he had no complaint in anyway about how [counsel] represented [him]. [Counsel] responded that he reviewed prosecution reports with [Petitioner] and [Petitioner] agreed that it was a fair statement of the evidence against him.

The Court finds that [counsel] was appointed to represent Petitioner in this case; and the records show . . . that discovery was complete, that all possible defenses were explained, that every option and possible defense and negotiation was explained

> to the Petitioner and the Petitioner made an informed decision to plead guilty after hard negotiations [by counsel]. The District Attorney's original plea offer was twenty (20) years 100% RED . . . . Petitioner, through [counsel's] efforts, was able to obtain a plea offer for the minimum sentence for Rape of a Child of fifteen (15) years 100% RED. If there was any different result that could come from things done differently by [counsel], it would most probably have resulted in a greater sentence for the Petitioner. . . .

The court also addressed the petitioner's allegation that counsel's performance was deficient because he failed to file a motion to suppress the petitioner's statement to police. The court found:

> The Court finds that Petitioner exercised his *Miranda* rights by requesting a lawyer on October 30, 2003 and that Detective Arnold rightfully ceased all questions. Petitioner was permitted to go home without being charged. Petitioner had approximately nine months to consult and receive the advice of counsel. On August 2, 2004, Petitioner was arrested and served with a warrant for Rape of a Child. Detective Arnold read Petitioner his Miranda rights and Petitioner signed a waiver of rights (Exhibit 2). At the evidentiary hearing, Petitioner alleged that he was under the influence of narcotics at the time of the waiver. . . . . This Court [finds] that Petitioner's allegations of being under the influence [are] not credible. This Court finds that Petitioner voluntarily, knowingly and intelligently waived his *Miranda* rights. The Court concludes that Petitioner's alleged ground that his conviction was based on violating against self-incrimination and violation of right to counsel is without merit . . . .

Like the post-conviction court, we conclude there is no merit to the petitioner's allegation that he received the ineffective assistance of counsel. The record in this case fully supports the post-conviction court's findings that counsel provided effective representation. Counsel's testimony, which was specifically accredited by the post-conviction court, established that he spoke with the petitioner on a number of different occasions, discussed the case with the petitioner, thoroughly investigated the facts of the case, was prepared to take the case to trial, negotiated a favorable plea agreement, and explained to the petitioner the nature and consequences of the guilty plea. Trial counsel testified that the case against the petitioner was very strong, and that he had not believed he would have any success with a motion to suppress. In sum, there is no evidence that counsel was deficient in his representation, or that the petitioner would not have pled guilty but for the alleged deficiencies of counsel. The record does not preponderate against the post-conviction court's findings, and therefore, the petitioner is not entitled to post-conviction relief.

The petitioner also presents an interrelated claim that he entered an unknowing and involuntary guilty plea because he did not understand the proof against him and he was heavily medicated.

A petitioner may successfully contest a conviction when his or her guilty plea is unknowing or involuntary. *See* Tenn. Code Ann. § 40-30-103; *Boykin v. Alabama*, 395 U.S. 238 (1969); *State v. Wilson*, 31 S.W.3d 189, 194 (Tenn. 2002). A plea is not voluntary or knowing if it results from

ignorance, misunderstanding, coercion, inducements or threats. *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993). In addition, a plea is not voluntary if the defendant "'is incompetent or otherwise not in control of his mental facilities' at the time the plea is entered." *Id*. (citations omitted). When determining the knowing and voluntary nature of the guilty plea, the court must look to various circumstantial factors including:

> the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Id. The standard is and remains "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *see also State v. Pettus*, 986 S.W.2d 540, 542 (Tenn. 1999). A petitioner's solemn declaration in open court that his or her plea is knowing and voluntary creates a formidable barrier in any subsequent collateral proceeding because these declarations "carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

Addressing the petitioner's claim regarding the voluntariness of the guilty plea, the post-conviction court made the following findings:

> Petitioner alleges that his guilty plea was unlawfully induced or involuntary and unknowing. Petitioner contends that his lawyer advised that he had no alternative but to plead guilty. At the evidentiary hearing, Petitioner alleged that at the time of his plea that he did not have knowledge of the law and the elements of rape like he does now. Petitioner contends the state did not have evidence of rape because the medical report did not show evidence of rips or tears to the victim. T.C.A § 39-13-501(7) defines "sexual penetration as intercourse, cunnilingus, fellatio, anal intercourse, *or any other intrusion, however slight*, of any part of a person's body or of any other person's body, the emission of semen is not required." In this case, the victim's testimony of the alleged penetration coupled with Petitioner's semen and DNA in the victim's underwear could be evidence sufficient to sustain a conviction.
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> At the evidentiary hearing, Petitioner alleged that his plea was involuntary and unknowingly made because he was under the influence of narcotics, i.e., Loratab [sic], when he gave his statement to Detective Arnold on August 2, 2004 and when he entered his best interest plea on June 13, 2005. On August 2, 2004 at 12:36 p.m., Petitioner signed an admonition and wavier of rights which included the statement "I understand and know what I am doing" (Exhibit 2). On June 13, 2005, [the trial court] accepted Petitioner's best interest plea and specifically asked Petitioner: Have you had any alcohol or drugs in the last 24 hours?" [Petitioner] replied: "No, Sir." (TR p.7). This [Court] finds that Petitioner's sworn testimony on June 13, 2005 is

> contradictory to his sworn testimony at the evidentiary hearing on July 5, 2007. Therefore, this Court finds that Petitioner is not to be believed under oath and that his allegations that he was under the influence at the time of his statement and subsequent best interest plea are false.
>
> As to the voluntariness of the plea, the Court finds that Petitioner's testimony that he did not understand the evidence against him and the consequences of his plea are simply not credible. During Petitioner's guilty plea, [the trial court] specifically explained the elements of the offense, sentence range for Rape of a Child, and Petitioner's Constitutional rights (TR p.7). Petitioner indicated that he was pleading guilty freely and voluntarily of his own free will. (TR p.13). Petitioner also indicated that he understood everything that was told or asked of him. (TR p. 14-15).
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> Therefore, for the foregoing reasons, the Court concludes that Petitioner's best interest plea on June 13, 2005 was voluntarily, intelligently, knowingly, and understandingly entered in all aspects.

As aptly noted by the post-conviction court, the record unquestionably establishes that the petitioner knowingly, intelligently, and voluntarily pled guilty to rape of a child and received a favorable fifteen-year sentence. There is no evidence in the record which preponderates against the findings of the post-conviction court. Therefore, the petitioner did not carry his burden of demonstrating that his plea was unknowing and involuntary. Accordingly, the petitioner is not entitled to relief.

CONCLUSION

Following our review, we conclude that the petitioner has not met his burden of proving that trial counsel was ineffective in his representation or that the petitioner's guilty plea was unknowing or involuntary. Accordingly, we affirm the denial of the petition for post-conviction relief.

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J.C. McLIN, JUDGE